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No. 05 - 1367

IN THE

Supreme Court of the United States

ILLINOIS,

Petitioner,

v.

JOHN L. SLOUP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Under *Terry v. Ohio*, 392 U.S. 1, 20 (1968), the scope and duration of a vehicle stop must be "reasonably related * * * to the circumstances that justified the [stop] in the first place." Faithfully adhering to *Terry*, the Illinois Supreme Court in *People v. Gonzalez*, 789 N.E.2d 260, 270 (Ill. 2003), held that "[i]n the absence of a reasonable connection to the purpose of the stop or a reasonable, articulable suspicion, [courts] must consider whether, in light of all the circumstances and common sense, [questioning of a motorist] impermissibly prolonged the detention or changed the fundamental nature of the stop." Petitioner invited the Appellate Court of Illinois, which issued the decision on which petitioner now seeks certiorari, to apply *Terry* and *Gonzalez* and failed to preserve an objection to either precedent's application or to *Gonzalez*' soundness. Accordingly, the question properly before this Court is:

> Whether, under the unique facts of this case, the Appellate Court of Illinois properly applied *Terry* and *Gonzalez* – both of which petitioner invited the court to apply – and found that the police officer's questioning of respondent and search of respondent's vehicle after a lawful traffic stop were undertaken without reasonable suspicion and thus violated the Fourth Amendment.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent John L. Sloup files this brief in opposition to the petition for a writ of certiorari filed by the State of Illinois.

OPINIONS BELOW

The order of the Supreme Court of Illinois (Pet. App. 1a) denying petitioner's petition for leave to appeal is reported at 844 N.E.2d 971 (2006). The opinion of the Appellate Court of Illinois (Pet. App. 2a-22a) is reported at 834 N.E.2d 995 (2005).

JURISDICTION

The Appellate Court of Illinois entered judgment on September 2, 2005. The Supreme Court of Illinois denied petitioner's petition for leave to appeal on January 25, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. In the early morning of September 28, 2003, Officer Opelt of the Westmont Police Department observed respondent driving in the left eastbound lane of 63rd Street in Westmont, Illinois. Pet. App. 3a. Respondent weaved within his lane "a couple times" and touched but did not cross the lane's yellow line. *Ibid.* Respondent also pulled within five or six feet of the rear bumper of another car that was traveling slowly in the same lane before passing that car on the right. *Ibid.* Respondent did not signal a lane change to pass until his car's tires touched the white lines that divided the left and right eastbound lanes. *Ibid.*

At that point, Officer Opelt stopped respondent's car, ran a check on the license plate, and found nothing noteworthy. *Ibid.* Officer Opelt's license plate check took approximately "a minute or two." Transcript of Motion to Suppress (TMS) 15, *People v. Sloup*, No. 02-CF-3805

(Ill. Cit. Ct. Mar. 26, 2003). After exiting his patrol car, Officer Opelt approached respondent, who was the vehicle's only occupant and lowered his window. Pet. App. 3a. Officer Opelt did not detect an odor of alcohol or cannabis or observe anything in plain view that would indicate criminal activity. *Ibid.* He asked respondent to produce his driver's license and proof of insurance, and respondent complied. *Ibid.* Officer Opelt returned to his squad-car, where he ran a check on respondent's license, again finding nothing amiss. *Ibid.* Officer Opelt's driver's license check lasted approximately "two, three minutes." TMS 18. Officer Opelt returned to respondent's car but did not return – indeed, never returned – respondent's license to him. Pet. App. 3a.

According to Officer Opelt, because he believed that respondent was acting unusually nervous for a routine traffic stop, he inquired about respondent's destination. *Id.* at 3a-4a. Respondent replied that he was heading to a restaurant in Downer's Grove, which Officer Opelt knew to be west of where Officer Opelt intercepted respondent. *Id.* at 4a. Officer Opelt then asked respondent what street he was on. *Ibid.* Respondent replied that he was on 75th Street – the same street on which he lived. *Ibid.* Officer Opelt told respondent that he was in fact on 63rd Street and then asked respondent why he was traveling eastbound on 63rd Street to the restaurant when the restaurant was in the opposite direction. *Ibid.* Respondent replied that, "in his mind," his route was the quickest. TMS 22. In Officer Opelt's opinion, the route respondent was taking to the restaurant "made absolutely no sense." Pet. App. 4a (quoting TMS 21-22).

Officer Opelt observed no indications in respondent's physical appearance or demeanor that he was under the influence of alcohol or drugs and acknowledged that nervousness is "not such a strong indicator" of being under the influence of anything. *Ibid.* (quoting TMS 27). Nonetheless, because respondent was heading in a "roundabout" way toward his destination, was acting

unusually nervous, and had been driving somewhat erratically, *ibid.* (quoting TMS 22), Officer Opelt still suspected that respondent might have been "under the influence of something," *ibid.* (quoting TMS 23).

Although Officer Opelt acknowledged that only reasonable suspicion is needed to warrant field sobriety tests, he did not deem it "necessary at that point to go ahead with the tests." *Ibid.* (quoting TMS 24). Instead, he asked respondent whether he was under the influence of any "street drugs." *Ibid.* (quoting TMS 28). Respondent replied in the negative but volunteered that he had been recently released from drug rehabilitation for a heroin addiction and that he had remained clean since his release. *Ibid.*

Officer Opelt acknowledged that respondent was not free to leave throughout their encounter but did not give respondent *Miranda* warnings because he did not believe that respondent was under arrest and conceded that he did not have probable cause to arrest respondent for driving under the influence of anything. *Ibid.* According to Officer Opelt, "[i]f [respondent] was under the influence of drugs, I didn't feel his condition was enough to warrant an arrest for driving under the influence of a controlled substance." *Ibid.* (quoting TMS 31); see also TMS 44 ("I didn't feel that his state of intoxication was such that it warranted an arrest for DUI, drugs.").

After approximately 10 minutes elapsed since the initial stop – through none of which respondent was free to leave, TMS 19, and through none of which Officer Opelt returned respondent's driver's license – Officer Opelt requested consent to search respondent's vehicle, Pet. App. 5a. Even though Officer Opelt had not come to a "conclusion of 100 percent surety" of whether respondent was under the influence of drugs, he believed that the presence or absence of contraband in the vehicle would be relevant to determining whether respondent was indeed

under the influence of drugs. *Ibid.* In Officer Opelt's view, "[j]ust because there's not probable cause to make the arrest for driving under the influence of a controlled substance doesn't mean that there's not controlled substances still inside the vehicle." *Ibid.* (quoting TMS 33).

Respondent consented to Officer Opelt's request to search. *Id.* at 4a. Meanwhile, a backup officer arrived on the scene, and Officer Opelt asked respondent to step out of his car and stand with the backup officer during the search. *Ibid.* Officer Opelt conceded that respondent had done nothing to make him fear an imminent attack. *Ibid.* Officer Opelt found a pipe used to smoke cocaine under the front passenger seat of respondent's car. *Id.* at 4a-5a. Even after finding the drug paraphernalia, and notwithstanding his acknowledgment that the discovery would be relevant to whether respondent was intoxicated, Officer Opelt never conducted field sobriety tests of respondent. *Id.* at 5a.

2. Respondent was charged with unlawful possession of a controlled substance. Common Law Record (CLR) 8. He filed a motion to quash his arrest and suppress the drug paraphernalia seized from his vehicle under the United States and Illinois constitutions. CLR 19-21. After conducting a hearing at which Officer Opelt was the only witness, the trial court denied the motion. Pet. App. 2a. In its oral decision, the trial court found Officer Opelt to be credible and held that respondent's erratic, though not necessarily illegal, driving provided an adequate basis to stop him. Pet. App. 5a; TMS 58. The court further found that Officer Opelt neither exceeded the scope of the initial stop nor unnecessarily extended the stop's duration. Pet. App. 5a; TMS 59. Following a brief bench trial at which little additional evidence was presented, the trial court found respondent guilty of unlawful possession of a controlled substance. Pet. App. 5a-6a.

3. Respondent timely appealed to the Appellate Court of Illinois. Respondent argued that his continued detention following the initial stop was improper[1] under *Terry*, *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003), and their progeny because Officer Opelt's questioning about street drugs and request to search "prolonged [respondent's] detention" and "changed the fundamental nature of the stop." Resp. Ill. Ct. App. Br. 2, 10-13. Petitioner expressly conceded that the constitutionality of the traffic-stop questioning and search was properly governed by *Terry* and *Gonzalez* and neither contested the legal underpinnings of *Gonzalez* nor otherwise preserved any challenge to its application. See, *e.g.*, Pet. Ill. Ct. App. Br. 4 ("The People agree with the defendant that this court is controlled generally by the principles set forth in *Terry v. Ohio*, 92 U.S. 1 (1968), and, more specifically, by the framework set forth in *Gonzalez*."). Instead, it offered the fact-bound arguments that, under *Gonzalez*, "Officer Opelt's questioning of [respondent] before asking for permission to search was reasonably related to the initial purpose of the stop (i.e. driving while under the influence of alcohol or drugs)," *id.* at 13; see also *id.* at 2, and "could not have impermissibly prolonged [respondent's] detention," *id.* at 12. See also generally *id.* at 9-13.

The court of appeal reversed in a published decision. Pet. App. 2a-22a. While noting that petitioner cited no section of the Illinois Vehicle Code "or any other law that [respondent] might have violated at the time of the stop," the court concluded, based on respondent's "weaving or swerving in the lane" and respondent's concession that the stop was justified at its inception (Resp. Ill. Ct. App. Br. 10) that the initial traffic stop was proper. Pet. App. 7a. It also agreed with petitioner and the trial court "that [respondent's] unexplained misidentification of his

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[1] Consistent with his position in the trial court, respondent did not contend that the stop was unjustified at its inception. Resp. Ill. Ct. App. Br. 10.

location, erratic driving, and unusual nervousness at the time of the stop warranted further questioning to investigate whether [respondent] was under the influence of alcohol or drugs." Pet. App. 10a.

But it recognized, under the unique facts of this case, that respondent's "'weaving or swerving in the lane,' and traveling within five or six feet of another car's bumper" were relatively "weak[] indicators of driving while under the influence of drugs" and that respondent's production of a valid driver's license and lack of physical indicia of intoxication "should have tempered Officer Opelt's intrusion." *Id.* at 9a. The court further found, as a matter of fact, that "Officer Opelt['s] conclu[sion] that [respondent's] responses to the questioning rendered field sobriety tests unnecessary" "illustrates that the officer's conversation with [respondent] resolved the ambiguity in [respondent's] conduct." *Ibid.*

Applying *Gonzalez* – as petitioner invited the court to do – the court held "that Officer Opelt's request to search the car for contraband was a fundamental shift from the purpose of the stop because, based on his interaction with defendant, it was unreasonable for Officer Opelt to suspect that there might be contraband in the [car]." *Id* at 12a. The court expressly declined to reach the question "whether Officer Opelt's request to search the car impermissibly prolonged the stop." *Ibid.*

4. Petitioner sought leave to appeal to the Illinois Supreme Court. There, for the first time throughout this litigation, petitioner argued that the *Terry/Gonzalez* framework was inappropriate and raised the questions it presents in its petition. See, *e.g.*, Petition for Leave to Appeal (PLA) in Illinois Supreme Court 15 ("This Court should grant leave to appeal to reconsider the *Gonzalez/Terry* framework * * * to articulate the correct standard for evaluating the Fourth Amendment validity of police conduct at lawful traffic stops."); *id.* at 2 ("When

analyzed under the appropriate standard, the police officer's request for consent to search defendant's car comported with the Fourth Amendment"). The Illinois Supreme Court denied petitioner leave to appeal without opinion. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

In an effort to obtain review of an evolving jurisprudential question that this Court has repeatedly declined to address,[2] petitioner has filed a petition that is virtually a verbatim recitation of a previous certiorari petition it had filed, even though the two cases involve substantively distinguishable factual contexts that, commensurately, are subject to distinct Fourth Amendment analyses.[3] In its haste to secure this Court's review, petitioner has inadequately focused on the case at hand, glossing over material facts that reveal why this case is a poor candidate for certiorari. Petitioner has not, for example, informed this Court that it failed to raise the issues on which it now seeks certiorari in either the trial court or in the intermediate appellate court below. It was not until petitioner unsuccessfully sought discretionary review by the Illinois Supreme Court that it first challenged the application of *Terry v. Ohio*, 392 U.S. 1 (1968), to the facts of this case.

Further, petitioner has not informed the Court of substantive ambiguities in the record that render uncertain the proper Fourth Amendment analytic framework to apply were certiorari granted. These ambiguities concern whether (1) the initial traffic stop was based on probable

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[2] See *infra* Part IV.

[3] Compare the certiorari petition here with the one petitioner filed in *Illinois v. Bartels*, No. 04-1066 (filed Feb. 3, 2005), *available at* 2005 WL 309363. *Bartels* involved a dog sniff conducted during a traffic stop. The instant case involves not a dog sniff but a consent-based search that was used to impermissibly prolong a routine traffic stop, turning what may have started as a legal seizure into an illegal seizure. The constitutionally distinct analyses and implications raised by the two situations are explored in greater depth in Part V below.

cause to believe that a moving violation had occurred, or reasonable suspicion that respondent was operating his vehicle under the influence, and (2) respondent's continued detention during the involuntary traffic stop had devolved into an illegal seizure by the time Officer Opelt extracted consent to search.

The one thing that is absolutely clear is that respondent enjoyed Fourth Amendment protections both from the inception, and throughout, the involuntary traffic stop. "[S]topping an automobile and detaining its occupants constitute[s] a 'seizure' within the meaning of [the Fourth and Fourteenth] Amendments, even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

I. Petitioner forfeited its questions presented by inviting the very errors about which it now complains

Before the court of appeal – the court about whose judgment petitioner now complains – petitioner conceded that the *Terry/Gonzalez* framework controlled the outcome of respondent's motion to suppress. Pet. Ill. Ct. App. Br. 4. Notably absent from petitioner's brief to the intermediate appellate court was any preservation of a challenge to *Gonzalez* by offering an objection that, while controlling, *Gonzalez* was wrongly decided and should be overturned by the Illinois Supreme Court or by this Court upon further review.[4] This concession, as petitioner acknowledges, resulted directly in both aspects of the court of appeal's judgment that petitioner now challenges and, therefore, infects both of petitioner's questions. See BIO 3 (acknowledging

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[4] This would not have been difficult to do. See, *e.g.*, *United States v. Aguirre-Villa*, 460 F.3d 681, 683 (CA5 2006) (noting that the defendant "recognizes that his * * * challenge is foreclosed by circuit precedent and raises it only to preserve it for possible Supreme Court review."); cf. *People v. Caballero*, 533 N.E.2d 1089, 1096 (Ill. 1989) ("Until the issue is finally settled by the United States Supreme Court, it is not unreasonable for defendants to keep raising it, if for no other reason than to preserve it for review upon habeas.").

with respect to petitioner's first question that, "[c]onsistent with settled Illinois precedent, the court below held that the police must have reasonable suspicion that contraband is present before asking such questions."), 10 (acknowledging with respect to petitioner's second question that "[t]he Illinois Appellate Court's analysis in this case adheres to a long line of Illinois precedent that uses *Terry* to evaluate the validity of unrelated police investigatory conduct at probable cause-based traffic stops.").

This Court does not ordinarily address questions that have not been properly presented to the courts below. See *United States v. Galletti*, 541 U.S. 114, 120 n.2 (2004) (holding that party "forfeited" argument by not raising it below); see also *Business Guides, Inc. v. Chromatic Commc'n Enters., Inc.*, 498 U.S. 533, 548 (1991); *Demarest v. Manspeaker*, 498 U.S. 184, 189 (1991); *IRS v. Federal Labor Relations Auth.*, 494 U.S. 922, 934 (1990); *FTC v. Grolier Inc.*, 462 U.S. 19, 23 n.6 (1983); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). As a result, the invited nature of an asserted error is one of the considerations counseling denial of a petition for writ of certiorari. *See Springfield v. Kibbe*, 480 U.S. 257, 258-260 (1987) (per curiam) (dismissing petition as improvidently granted because "[n]o reversible error exits where [a] complainant * * * has invited the error by propounding law which she now claims is inapplicable" and recognizing that the Court's "inability to reach [one] issue makes this case an inappropriate vehicle for resolving the [other] question, because of the close interrelationship between the two matters.").

While "[a]ny issue 'pressed or passed upon below' by a *federal* court is subject to this Court's broad discretion over the questions it chooses to take on certiorari," *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (quoting *United States v. Williams*, 504 U.S. 36, 41

(1992)) (emphasis added), the same is not necessarily true when reviewing a state court judgment – as is the case here. "Where certiorari is sought to a state court, 'due regard for the appropriate relationship of this Court to state courts,' may suggest greater restraint in applying our 'pressed or passed upon' rule." *Williams*, 504 U.S. at 44 n. 5 (quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940)).

For example, in *Illinois v. Gates*, 462 U.S. 213 (1983), the petitioner State of Illinois argued that this Court should modify the rule requiring exclusion of evidence obtained in violation of the Fourth Amendment to include a good faith exception. The *Gates* respondents had argued "at every level * * * the claim that the Fourth Amendment had been violated * * * and that the evidence seized by the officers should be excluded." *Id.* at 221. And the State countered "at every level * * * respondents' claim that the substantive requirements of the Fourth Amendment had been violated. The State never, however, raised or addressed the question whether the federal exclusionary rule should be modified in any respect." *Ibid.* (emphasis added).[5] Not unlike *Gates*, where petitioner defended the constitutionality of its police officers' conduct but failed to seek modification of the exclusionary rule, in this case, petitioner defended the

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[5] Petitioner challenged the *Terry/Gonzalez* framework for the first time in its petition for leave to appeal to the Illinois Supreme Court. Raising an issue in a petition that the reviewing state court may grant or deny as a matter of discretion does not preserve the issue. For example, in *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), the appellants argued to this Court that the California Unruh Act, Cal. Civ. Code § 51, was unconstitutionally vague and overbroad. The appellants did not present this argument in their merits-briefing to the California Court of Appeal. *Ibid.* Instead, they raised the argument for the first time in their petition for rehearing to that court. *Ibid.* The court denied the petition without opinion, *id.* at 550, and the California Supreme Court denied review without opinion, *id.* at 543. This Court refused to entertain the appellants' argument on the basis that it was insufficiently preserved. *Id.* at 550.

constitutionality of Officer Opelt's conduct but failed to seek modification or replacement of Illinois' *Terry/Gonzalez* framework.

Declining to reach the issue in *Gates*, this Court explained that the Illinois Supreme Court should "be given an opportunity to consider the constitutionality of the actions of [its own] state officials, and, equally important, proposed changes in existing remedies for unconstitutional actions." *Id.* at 221-22. Moreover, by requiring the State to first argue to the state courts that a federal rule should be modified, the Court explained, "we permit a state court, even if it agrees with the State as a matter of federal law, to rest its decision on an adequate and independent state ground." *Id.* at 222; see also *Williams*, 504 U.S. at 44 n.5 ("[T]he absence of challenge to a seemingly settled federal rule deprives the state court of an opportunity to rest its decision on an adequate and independent state ground."); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988) ("Our review of appellant's claim now would short-circuit a * * * less intrusive, and possibly more appropriate, resolution[]: * * * the Mississippi state courts may choose to resolve the issue by relying on the State Constitution or on some other adequate and independent nonfederal ground.").

As petitioner acknowledged below, Pet. Ill. Ct. App. Br. 4, respondent invoked both federal and state constitutional protections against improper search and seizure before the trial court, Pet. Mot. to Supp. 1-2, *People v. Sloup*, No. 02-CF-3805 (Ill. Cit. Ct. Mar. 10, 2003) (CLR 19-20), and preserved those issues on appeal, Resp. Ill. Ct. App. Br. 10. While the Illinois Supreme Court generally interprets the Illinois Constitution in parity with this Court's Fourth Amendment jurisprudence, that approach is expressly "limited." *People v. Tisler*, 469 N.E.2d 147, 155-57 (Ill. 1984) (announcing a "limited lockstep" approach between Illinois Constitution and the Fourth Amendment while at same time jealously guarding Illinois Supreme Court's authority to

interpret state constitutional search and seizure provisions as providing broader protections than Fourth Amendment); see also *People v. Caballes*, 851 N.E.2d 26, 45 (Ill. 2006) ("[T]his court adopted a limited lockstep approach in Tisler and modified it * * * to allow consideration of state tradition and values as reflected by long-standing state case precedent."). And in appropriate cases, the Illinois Supreme Court has departed from federal search and seizure rules. See, *e.g.*, *People v. Cox*, 782 N.E.2d 275 (Ill. 2002), cert. denied, 539 U.S. 937 (2003) (holding that dog sniff during traffic stop constituted unconstitutional search because it impermissibly prolonged stop's duration, declining to follow *United States v. Place*, 462 U.S. 696 (1983) (dog sniff is not a search under Fourth Amendment), and not mentioning *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (same)); *People v. Krueger*, 675 N.E.2d 604 (Ill. 1996) (holding that police search conducted under no-knock statute that was later held unconstitutional violated Illinois Constitution despite police's good-faith reliance upon statute and expressly declining to follow *Illinois v. Krull*, 480 U.S. 340 (1987) (good faith exemption to Fourth Amendment exclusionary rule permitted use of evidence seized by police who reasonably relied on statute later declared to be unconstitutional)). Had the Illinois Supreme Court granted petitioner's petition for leave to appeal and agreed with petitioner that *Gonzalez* was an inappropriate expression of federal law, respondent would have still been able to argue that *Gonzalez*' durational and scope limitations should be recognized as an appropriate expression of Illinois law.

We anticipate that petitioner will counter that it preserved its challenge to the *Terry/Gonzalez* framework by raising it in its petition for leave to appeal to the Illinois Supreme Court and that doing so earlier would have been futile. Such an argument, however, itself presents an additional independent and adequate state ground on which the Illinois Supreme

Court could have affirmed the court of appeal's decision. In Illinois, "'[i]t is fundamental to [the] adversarial process that a party waives his right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding.'" *McMath v. Katholi*, 730 N.E.2d 1, 3 (Ill. 2000) (quoting *Auton v. Logan Landfill, Inc.*, 475 N.E.2d 817, 818 (Ill. 1984); cf. Ill. S. Ct. R. 341(e)(7) ("Points not argued are waived."). Put another way, under settled Illinois law, "a party cannot complain of error which that party induced the court to make or to which that party consented." *In re Detention of Swope,* 821 N.E.2d 283, 287 (Ill. 2004); accord, *People v. Schmitt*, 545 N.E.2d 665, 668 (Ill. 1989) ("Where a party acquiesces in proceeding in a given manner, he is not in a position to claim he was prejudiced thereby."). Illinois courts apply this principle equally to the State and private parties. See *People v. Collins*, 813 N.E.2d 285, 290 (Ill. App. Ct. 2004) ("[T]he State is precluded from complaining about an error it invited." (citing *McMath,* 730 N.E.2d at 3)).

II. This case is a poor vehicle to resolve petitioner's second question due to uncertainty in the record concerning whether the vehicle stop was based on probable cause that a traffic violation had occurred or reasonable suspicion of a DUI

A primary reason why the certiorari petition in this case should not be granted is that uncertainty exists in the record regarding whether Officer Opelt's initial traffic stop of respondent was based upon probable cause or merely reasonable suspicion. The Fourth Amendment applies a duration limit to the stop in either case, but the standard for determining the allowed length of the stop differs depending on which applies. Thus, determining which level of suspicion justified the initial stop is crucial because the answer leads to different Fourth Amendment analyses.

This Court's precedents establish that the appropriate Fourth Amendment analysis to apply to an involuntary traffic stop depends upon the level of suspicion that justified the stop. In some circumstances, such as when an officer sees a vehicle engage in an obvious moving violation, an involuntary traffic stop is based upon probable cause. See *Illinois v. Caballes*, 543 U.S. 405, 406-07 (2005); *Whren v. United States*, 517 U.S. 806, 810 (1996). When probable cause justifies the stop, the seizure "can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission." *Caballes*, 543 U.S. at 407. Under the Fourth Amendment's general reasonableness test, a balancing standard that weighs the public and private interests at stake is used to determine the valid duration of a stop. See *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 449-50 (1990).

In other situations, such as when an officer does not see a moving violation but gleans other facts that raise a reasonable suspicion of a crime, such as a driver who might be operating the vehicle under the influence, an involuntary traffic stop is based upon reasonable suspicion. See, *e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (holding that officers seeking to enforce immigration laws may stop vehicles only if specific articulable facts and rational inferences raise reasonable suspicion that occupants might be unlawful aliens); *Adams v. Williams*, 407 U.S. 143 (1972) (approving of officer who investigated car's occupant based upon reasonable suspicion, which was obtained from informant's tip that occupant was carrying narcotics and a firearm). When only reasonable suspicion supports an involuntary stop, *Terry* controls the propriety of the seizure and any search that directly results from that seizure. In the involuntary traffic stop context, the ubiquity of searches and seizures based upon reasonable suspicion has led this Court to repeatedly indicate for over thirty years that traffic stops are often

analogous to *Terry* stops, a general principle the Court has reiterated as recently as six years ago.[6]

Because *Terry* allows seizures and searches upon the lower reasonable suspicion standard rather than the higher probable cause standard, and in a context where the officer's discretion is unconfined by prior judicial review or other formal guidelines, this Court has emphasized that stricter duration limits apply: the seizure is subject to duration limits and the search is subject to scope limits. See *Terry*, 392 U.S. at 19. Thus, this Court has explained that, when *Terry* applies to a traffic stop, "the stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' " *Brignoni-Ponce*, 422 U.S. at 881 (quoting *Terry*, 392 U.S. at 29).

The record is ambiguous concerning whether Officer Opelt's initial traffic stop of respondent was based on probable cause to believe that respondent had committed a moving violation, or reasonable suspicion that some other infraction such as driving under the influence might be occurring. Petitioner's position is not perfectly clear, though it appears to contend that probable cause justified the initial stop. This follows from petitioner's second Question Presented, which refers to "a lawful traffic stop justified by probable cause," as well as from its assertion that "Officer Opelt * * * observed a Buick commit traffic violations." Pet. i, 2.

To the contrary, however, the record indicates that at most only reasonable suspicion justified the initial stop, and at a minimum the record is ambiguous regarding the applicable level of suspicion. The record does not support that probable cause justified the stop because in the traffic enforcement context probable cause exists only by reference to some clearly discerned

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[6] See *Knowles v. Iowa*, 525 U.S. 113, 117 (1998); *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *Michigan v. Long*, 463 U.S. 1032, 1049-50 & n.14 (1983); *Prouse*, 440 U.S. at 661, 663; *Pennsylvania v. Mimms*, 434 U.S. 106, 109-11 (1977); *Brignoni-Ponce*, 422 U.S. at 878, 881-82; *Adams*, 407 U.S. at 144, 147-48.

legal infraction. No such infraction exists here. Officer Opelt testified that he saw (1) a Buick weave within its lane a few times; (2) the Buick's tires touching but not crossing the yellow line that divided oncoming traffic; (3) the Buick "pull within five or six feet of the rear bumper of another car that was traveling slowly in the same lane"; and (4) the Buick pass the car on the right while initiating a lane change signal once the Buick's tires had touched the white lines that divided eastbound traffic. Pet. App. 3a. No moving violation is evident upon these facts. Indeed, as the opinion below explained:

> [t]he State has not cited any section of the Illinois Vehicle Code (625 ILCS 5/1-100 *et seq.* (West 2004)) or any other law that defendant might have violated at the time of the stop, and in fact, the trial court speculated that defendant did not violate any traffic law by touching the white lane lines while activating his turn signal.

Id. at 7a. To date, petitioner still has not identified any moving violation or other law that respondent might have violated at the time of the initial traffic stop. Thus, contrary to petitioner's apparent position, the record does not support that Officer Opelt's initial stop of respondent was supported by probable cause.

Instead, the record reflects that Officer Opelt's motivating factor for initiating the traffic stop was concern that respondent might "be under the influence of something" based upon his "driving skills on the road." TMS 23; *see also id.* 25-26. This is further supported by Officer Opelt's testimony that he would arrest a driver operating under the influence "only * * * after establishing probable cause," as this is an implicit admission that he *lacked* probable cause when he initiated the stop. TMS 25. Indeed, Officer Opelt's initial suspicion—apparently the barest reasonable suspicion—was never confirmed. He did not arrest respondent based upon probable cause to believe that he had been driving under the influence. See Pet. App. 4a (recounting officer's testimony that "[i]f [respondent] was under the influence of drugs, I didn't feel his

condition was enough to warrant an arrest for driving under the influence of a controlled substance" (quoting TMS 31)); TMS 44 (officer testified that "I didn't feel that his state of intoxication was such that it warranted an arrest for DUI, drugs"). Rather, Officer Opelt arrested respondent due to having found drug paraphernalia after searching respondent's car. Pet. App. 4a (officer found drug paraphernalia during car search); TMS 41 (same).

Thus, at most the record supports only that Officer Opelt initiated the traffic stop based upon *reasonable suspicion* that respondent might be operating his vehicle under the influence, not based upon probable cause to believe that he had committed a traffic violation. See *People v. Greco*, 783 N.E.2d 201 (Ill. Ct. App. 2003) (holding that erratic driving, though vehicle stayed within single lane, created *reasonable suspicion* that defendant was driving under influence). At a minimum the record is insufficiently clear regarding whether reasonable suspicion or probable cause justified the initial stop as to render this case a poor candidate for certiorari given the analytical difficulties that ensue from that uncertainty.

III. This case is a poor vehicle to resolve petitioner's first question because a resolution is inextricably linked to whether the traffic stop was impermissibly extended

Certiorari should be denied because petitioner seeks to have this Court resolve the scope of proper police questioning during an involuntary traffic stop independent of whether that questioning, specifically a request for consent to search, occurred during an illegal or legal seizure. As a general matter, conducting such an inquiry is analytically impossible under this Court's Fourth Amendment jurisprudence because a search conducted pursuant to consent that was extracted during an illegal seizure violates the Fourth Amendment. See *Florida v. Royer*, 460 U.S. 491 (1983); cf. *Dunaway v. New York*, 442 U.S. 200, 218-19 (1979) (holding that voluntary statements given during illegal detention are inadmissible); *Brown v. Illinois*, 422 U.S.

590, 601-02 (1975) (same). More specifically, on the unique facts of this case such an exercise would be ineffectual.

The importance of whether the consent that Officer Opelt extracted from respondent occurred during a period of an illegal or legal seizure is readily explained by reference to the Illinois Supreme Court's decision in *People v. Brownlee*, 713 N.E.2d 556 (Ill. 1999), which affirmed the trial court's granting of a motion to suppress despite officers having obtained consent to search after an initially valid traffic stop. The officers had initiated the traffic stop after seeing a car engage in two minor traffic violations. The officers approached the car, and next completed the routine investigation attendant to traffic stops, such as checking for outstanding warrants. The officers then returned the driver's license and insurance card and explained that no citations would be issued. Rather than allowing the car to proceed on its way, the officers then "paused a couple [of] minutes," after which they requested and obtained consent to search the car. *Id.* at 559. The Illinois Supreme Court ruled that "[t]he problem in this case was not that the officers requested permission to search the car. It was that the officers unconstitutionally detained the car and its occupants *before* requesting permission to search the car, and after the conclusion of the traffic stop." *Id.* at 563.

The petition in this case glosses over facts showing that *Brownlee* and this case are factually indistinguishable. In this case, Officer Opelt completed his routine investigation attendant to the traffic stop (which consisted of a license plate and driver's license check) within four to five minutes. See TMS 13-15, 18, 35; see also Pet. App. 3a. Officer Opelt returned to respondent's car a second time and asked questions relevant to Officer Opelt's suspicion that respondent might have been under the influence. See TMS 19-23, 26, 28-29; Pet. App. 3a-4a. It was only at the end of this questioning that Officer Opelt sought consent to search respondent's

car. TMS at 29. The entire stop, prior to when Officer Opelt requested consent, lasted about 10 minutes. Pet. App. 4a. Thus, Officer Opelt had questioned respondent for about five minutes prior to requesting consent.

The crucial issue petitioner ignores concerns the legality of respondent's seizure at the end of that 10-minute period, an issue that informs the analysis concerning respondent's consent to search at that point. Petitioner has failed to inform the Court of numerous facts relevant to determining whether the initial traffic stop was devolving or had devolved into an illegal seizure by the 10-minute mark. First, Officer Opelt explicitly acknowledged that no probable cause existed to field test respondent's sobriety as the 10-minute period came to an end. TMS 31-32. Second, and more importantly, Officer Opelt implicitly acknowledged a lack of even reasonable suspicion to field test respondent's sobriety at that point. See *id.* at 24, 42-43; see also Pet. App. 4a (reciting that officer "did not direct [respondent] to perform any field sobriety tests" though he "acknowledged that only reasonable suspicion is needed to warrant field sobriety tests"); Pet. App. 5a (recounting that officer "never conducted field sobriety tests" in this case). Third, in addition to questioning respondent, Officer Opelt had already used numerous other investigatory techniques to either assuage or confirm his suspicions that respondent might be under the influence, but none of them were positive indicators of alcohol or illegal substances. Officer Opelt had detected no odor of alcohol or illegal drugs such as cannabis, cocaine, or heroin. Pet. App. 3a-4a; TMS at 16. He had "observed no indications in [respondent's] physical appearance or demeanor that he was under the influence of drugs." Pet. App. 4a. He had seen no illegal drugs in plain view. Pet. App. 3a; TMS 16. He admitted that his plain view search had resulted

in no indication that any crime had been or was being committed. *Ibid.* And he repeatedly acknowledged that respondent had been cooperative throughout the encounter.[7] TMS 18, 21.

Under these circumstances, this Court's precedents make clear what should have happened at the end of the 10-minute period had Officer Opelt been complying with the Fourth Amendment, given that it appears his initial stop was premised upon reasonable suspicion.[8] When *Terry*'s duration and scope limits apply to a traffic stop, the Court has explained that:

> [t]ypically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. * * * [U]nless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.

Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984) (footnote omitted). Thus, at the end of the 10-minute period Officer Opelt had reached a point where the brief investigative stop allowed under *Terry* had reached its duration limit. This is because Officer Opelt had exhausted numerous investigative avenues to confirm his initial suspicion that respondent was under the influence, but each of those techniques had *disproved* his suspicions until no reasonable suspicion existed. Indeed, this is precisely why Officer Opelt had concluded that he *lacked* grounds to perform a field sobriety test.

Consequently, Officer Opelt should have allowed respondent to leave. From that point on, Officer Opelt's detention of respondent became an illegal seizure because it was no longer *objectively* justified by reasonable suspicion. Nonetheless, rather than allow respondent to

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[7] Also potentially relevant is that Officer Opelt had no fear for his own safety. He (1) had seen no weapon in plain view; (2) had no reason to believe that respondent was carrying a weapon; and (3) admitted respondent had done nothing to make him fear an imminent attack. Pet. App. 4a; TMS 16, 31.

[8] See *supra* Part II.

proceed, Officer Opelt here did what the officer in *Brownlee* had done—he attempted to use consent to evade *Terry*'s limits. Under the Fourth Amendment, however, the illegal seizure tainted the consent Officer Opelt subsequently extracted from respondent. If anything, the situation here is even more objectionable than in *Brownlee* because here Officer Opelt never returned respondent's driver's license. TMS 19, 33. Officer Opelt's retention of it had the effect of pressuring respondent's consent to the search.

To the extent petitioner attempts to argue that Officer Opelt was still within *Terry*'s duration limit when he extracted consent from petitioner, it is incorrect both as a matter of law and because the record does not support such a finding. On the legal front, petitioner cannot plausibly argue that Officer Opelt's request for consent at the end of the 10-minute stop was *necessarily* within Fourth Amendment bounds given this Court's prior approval of a 20-minute traffic stop. *Sharpe*, 470 U.S. 675. Durational legitimacy under the Fourth Amendment is not governed by bright-line time limits. See *id.* at 685 (rejecting use of bright-line rule to evaluate whether investigative detention unreasonable). Rather, as *Sharpe* itself explained, *durational legitimacy depends upon Officer Opelt's actions during the period in question*. See *id.* at 686 ("In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."). Officer Opelt's actions here explain why *Terry*'s duration limit had been reached at the 10-minute mark: the cumulative impact of the numerous

investigative techniques Officer Opelt had employed had *dispelled* his suspicions and resulted in a lack of reasonable suspicion.[9]

As for the record, petitioner may point to the trial court's attempt to distinguish *Brownlee* on the basis that the initial traffic stop in that case had ended before consent was sought. The trial court found that in the instant case, by contrast, "[t]he officer has not completed the traffic stop. It's not a *Brownl[ee]* situation where he'd turned the license back over and then started to ask questions. It's during the traffic stop." TMS 59 (emphasis added). This trial court finding is unavailing to petitioner because a careful reading of the quoted passage reveals that it pertains to a point of time *prior to* Officer Opelt's request for consent, which is clear from the trial court's implicit reference to the second five-minute period during which Officer Opelt was "ask[ing] questions," all of which preceded Officer Opelt's request for consent to search. See TMS 59. Even if the trial court's finding is deemed to relate to the request for consent, it is still unavailing for the same reason as the trial court's later conclusion that Officer Opelt "asked for consent;

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[9] Petitioner cannot discredit respondent's position that he was improperly seized by characterizing his argument as demanding use of the "least intrusive means" available. We acknowledge that this Court has repeatedly rejected such an approach when assessing the constitutionality of traffic stops. See *Sharpe*, 470 U.S. at 686-87; *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 n.12 (1976). Our point is not that Officer Opelt had to use the least intrusive means available for conducting his investigation into whether respondent was under the influence. To the contrary, we does not take issue with the myriad investigational techniques Officer Opelt used or validly could have used during the legitimate period of the traffic stop, ranging from routine record checks, to questioning respondent, to seeking to detect the odor of suspected substances, to using plain view searches both of respondent's appearance and demeanor as well as the car's interior, or even field sobriety tests had Officer Opelt believed them warranted (which could have legitimately extended the prior of the legal seizure). Our position is that, at the 10-minute mark, Officer Opelt's investigation into whether respondent was under the influence had resulted in the lack of any objectively-based reasonable suspicion to believe this was so, and therefore the end of *Terry*'s duration limit had been reached and he should have allowed respondent to go. But Officer Opelt did not do so, which turned the encounter into an illegal seizure.

was given consent. I don't think he's beyond the scope of what the stop was, and I think that he was still—the time frame is not overly extended * * *" TMS 59. To the extent the trial court concluded that Officer Opelt did not impermissibly extend the stop's duration through consent, such a conclusion is clearly erroneous. It was made summarily, with no analysis whatsoever, and it ignores that, as explained above, Officer Opelt had exhausted the menu of options he had available for reasonably investigating whether respondent was under the influence. More importantly, the court of appeal below correctly recognized that this Court's Fourth Amendment precedents place limits on the duration of traffic stops, but explicitly declined to resolve the duration issue presented here. Pet. App. 12a (ruling that officer impermissibly expanded scope of stop when he asked for consent, but expressly declining to consider whether officer impermissibly expanded stop's duration).

Equally unavailing to petitioner's argument that Officer Opelt sought consent within *Terry*'s duration limit is Opelt's testimony that respondent was not free to leave at any point during the encounter. See Pet. App. 4a; TMS 30, 52. This point is immaterial because it begs the issue. The issue is not whether Officer Opelt had *subjectively* decided that respondent was not free to leave. See *Arkansas v. Sullivan*, 532 U.S. 769, 771-72 (2001); *Whren*, 517 U.S. at 813. The issue is whether, in accordance with *objective* Fourth Amendment limits, Officer Opelt had properly restrained respondent's liberty. See *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (explaining that objective standard applies to investigatory stops). Admittedly, the trial court seems to have answered the question affirmatively ("the time frame is not overly extended"), but as explained above, this conclusion was reached summarily, is clearly erroneous, and the court of appeal below refused to endorse it.

Properly understood, the record shows that Officer Opelt impermissibly sought consent at a point when the period of a valid seizure had ended, thus turning a legal seizure into an illegal seizure. At a minimum, the record is unclear on this crucial point due to the court of appeal's refusal to review the issue. Consequently, this Court should deny certiorari because it would not be able to assess the impact of the consent Officer Opelt extracted since a predicate to any such analysis is whether the consent was sought during a legal or illegal seizure. Even if the Court attempted to surmount that difficulty, the merits of this case cannot be conclusively resolved at this level because the case would have to be remanded for further consideration of whether respondent's detention had devolved into an illegal seizure. See *Muehler v. Mena*, 544 U.S. 93, 102 (2005) (remanding rather than addressing argument that detention had devolved into illegal seizure because court below had declined to address issue). In either case, the uncertainty that exists regarding the validity of respondent's continued seizure despite his consent to search renders this case a poor vehicle for considering the scope of *Terry*'s applicability to traffic stops, and therefore this Court should deny certiorari.[10]

IV. There is no harm in waiting for a case in which it is clear that no illegal seizure is involved and the basis for the vehicle stop is clear

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[10] There can be no doubt that respondent has preserved his durational argument for appeal by arguing for the applicability of *Brownlee*, 713 N.E.2d at 563. Before the trial court, respondent's counsel argued that, "as to the issue of consent, as *Brownl[ee]* says, if a person is illegally seized, consent can be subsequently tainted, can be invalidated by the illegal seizure and that's what happened here." TMS at 54 (emphasis added). Before the Illinois intermediate appellate court, respondent also argued the adequacy of his consent in light of *Brownlee*. See Resp. Ill. Ct. App. Br. 12. Further, the Illinois intermediate appellate court decision from which petitioner seeks to appeal relied upon *Brownlee*, though as already explained it declined to rule on whether Officer Opelt's request for consent "impermissibly prolonged the stop." Pet. App. 12a.

Rather than accept certiorari in this case despite the analytical difficulties explained above, the Court's limited resources would be better served in waiting for a more appropriate vehicle to examine the issues petitioner seeks to raise. Indeed, this Court has long declined to review those issues in favor of allowing the jurisprudence to develop in the courts below. Further, no harm would come from avoiding review here because this Court has abundant opportunities to grant certiorari in other similar cases given that involuntary traffic stops are commonplace.

This Court's long history of refusing review of these issues is only partially evident from the petition. In presenting the handling of these issues in the courts below, petitioner itself cites to no less than eight cases in which this Court has denied certiorari, spanning a 12-year period. Pet. 4-8. Petitioner's presentation, however, does not tell the whole story. In addition to the eight cases cited by petitioner, non-exhaustive research has uncovered seven other cases in which this Court has denied certiorari in cases involving consent searches during traffic stops, over a period spanning 50 years.[11]

Certainly no harm would come from delaying review while awaiting a more appropriate vehicle, which certainly will be readily available. This is because, as this Court is well aware, involuntary traffic stops occur frequently, a common sense truth that commentators confirm.

> Every day, millions of cars are stopped for one of the myriad of regulations governing our use of public streets. . . . So dense is the modern web of motor vehicle regulations that every motorist is likely to get caught in it every time he drives to the grocery store.

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[11] Those decisions are: (1) *United States v. Simms*, 385 F.3d 1347 (11th Cir. 2004), cert. denied, 544 U.S. 988 (2005); (2) *United States v. Yang*, 345 F.3d 650 (8th Cir. 2003), cert. denied, 541 U.S. 952 (2004); (3) *United States v. Roberson*, 6 F.3d 1088 (5th Cir. 1993), cert. denied, 510 U.S. 1204 (1994); (4) *State v. Kremen*, 754 A.2d 964 (Me. 2000), cert denied, 531 U.S. 1079 (2001); (5) *State v. Cohen*, 711 P.2d 3 (N.M. 1985), cert. denied, 476 U.S. 1158 (1986); (6) *State v. Barron*, 395 P.2d 158 (Or. 1964), cert. denied, 380 U.S. 920 (1965); and (7) *State v. McPeak*, 90 S.E.2d 501 (N.C. 1955), cert. denied, 351 U.S. 919 (1956).

Markus Dirk Dubber, *Policing Possession: The War On Crime And The End Of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 874 (2001); see also *Rehnquist Is Given Ticket for Speeding*, N.Y. TIMES, Sept. 13, 1986, at 10, col. 1. Moreover, involuntary traffic stops are commonly used to achieve purposes other than traffic law enforcement, with consent searches representing one technique that officers often use. See Frank C. Mills, III, *Annual Survey of Georgia Law: Criminal Law*, 46 MERCER L. REV. 153, 178-79 (1994) ("Frequently, automobile investigative stops are made for minor traffic violations, after which plain view or consent result in a finding of contraband."). Indeed, the federal courts are well acquainted with such law enforcement strategies, including those used in Illinois. See, *e.g.*, *Chavez v. Illinois State Police*, 251 F.3d 612, 621 (7th Cir. 2001) (describing Illinois State Police drug interdiction program named "Operation Valkyrie," which is "designed to acquaint patrol officers with techniques which will enhance their capability to detect and apprehend drug couriers * * * while focusing on the enforcement of highway safety regulations") (internal quotations and citation omitted); *Roberson*, 6 F.3d at 1092 (reviewing involuntary traffic stop that resulted in consent search, and recounting that during previous five years officer had "arrested 250 people on drug charges, all after traffic stops," of which "only four were warrant-authorized").

Under these circumstances, where this case presents serious analytical difficulties and cannot be conclusively resolved at this level, and where the Court is assured that many other more suitable candidates for review will exist because requests for consent to search during involuntary traffic stops are so common, this Court should deny certiorari.

V. The court of appeal's decision is correct

Since the traffic stop here was at most initiated under reasonable suspicion rather than probable cause, *Terry* provides the correct analytical framework for deciding whether the

resulting search and seizure complied with the Fourth Amendment.[12] The decision below correctly relied upon and applied *Terry* to the traffic stop.

As *Terry* itself emphasized, stops conducted under authority of that decision need to have a stopping point, and this Court has emphasized the importance of this principle in explaining that *Terry* stops must be of limited scope and duration. See, *e.g.*, *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 185 (2004) ("To ensure that the resulting seizure is constitutionally reasonable, a *Terry* stop must be limited."); *Terry*, 392 U.S. at 19. Applying this guidance, both this Court and Illinois courts have properly limited the scope and duration of traffic stops. See, *e.g.*, *Knowles*, 525 U.S. at 117-18 (analogizing routine traffic stop to *Terry* stop and holding unconstitutional full search of automobile after issuance of speeding ticket though state statute authorized search and defendant could have been arrested and car fully searched incident to arrest); *Berkemer,* 468 U.S. at 439-40; *Cox*, 782 N.E.2d at 279. Given these *Terry* limits, the decision below was in full accord with the precedents of both this Court and of Illinois courts, which have invalidated *Terry* searches whose scope or duration were extended by consent, including in the traffic stop context. See, *e.g.*, *Royer*, 460 U.S. 491; *Brownlee*, 713 N.E.2d 556; *People v. Hall*, 814 N.E.2d 1011 (Ill. Ct. App. 2004).

This Court's Fourth Amendment jurisprudence makes plain why the *Terry* limits are necessary and proper, particularly in the traffic stop context. This jurisprudence differentiates between *voluntary* versus *involuntary* stops because that distinction influences whether a Fourth Amendment seizure has even occurred, and if so whether a legal or illegal seizure is at issue. This explains why the State's reliance upon *Florida v. Bostick*, 501 U.S. 429 (1991), lacks merit.

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[12]See *supra* Part II.

The situation *Bostick* envisions—an officer merely approaching an individual in a public place, such as on a sidewalk, in an airport, or on a bus, to engage in a voluntary exchange—does not even constitute a Fourth Amendment seizure. *Bostick*, 501 U.S. at 434. Involuntary traffic stops, by contrast, are indisputably Fourth Amendment seizures. *Prouse*, 440 U.S. at 653. By definition, they occur—as the one at issue here did—in an inherently involuntary context under full force of state authority. For example, this Court has noted that most state laws make it a crime to leave such a stop without police permission. *Berkemer*, 468 U.S. at 436. Also constitutionally significant is that these stops present a real potential of danger for both police and the person stopped. Both are in danger from passing traffic. Police are potentially in danger from the vehicle's occupants. And the persons stopped are potentially in danger from either rogue police or police imposters. These distinctions are of a constitutional magnitude and thus justify applying the *Terry* limits to involuntary traffic stops.

The *Terry* limits also are necessary due to the implications that some of this Court's other precedents have had for persons subjected to involuntary traffic stops. The fundamental premise of a *Bostick* stop is that the encounter is completely voluntary, and as a result the person stopped and questioned is constitutionally guaranteed that no adverse consequences will flow from a refusal to cooperate. See *Bostick*, 501 U.S. at 437 ("[A]n individual may decline an officer's request without fearing prosecution. We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.") (citation omitted).

By contrast, the cumulative impact of this Court's precedents shows that persons subjected to involuntary traffic stops may well confront adverse consequences should they refuse to cooperate. For example, this Court has allowed police to demand identifying information

during *Terry* stops, even on pain of arrest. See *Hiibel*, 542 U.S. at 186-88; *Hayes v. Florida*, 470 U.S. 811, 816 (1985); *United States v. Hensley*, 469 U.S. 221, 229 (1985).[13] The decision that most clearly created a constitutional chasm between *Bostick* and *Terry* stops was *Atwater v. City Of Lago Vista*, 532 U.S. 318 (2001), which authorized arrests for even minor traffic offenses customarily punished only by a fine. The unfettered arrest discretion that *Atwater* provided to police fundamentally altered the constitutional status of persons subjected to involuntary traffic stops because it effectively makes cooperation mandatory lest the officer invoke his discretion to arrest. *Atwater*, however, had no impact upon persons subjected to a *Bostick* stop.

The mandatory cooperation dynamic resulting from *Atwater* extends to police requests for consent to search. Nothing in *Atwater* prevents an officer from invoking his power to arrest in response to a refusal to consent.[14] The officer then could search the car and any containers in it as either a search incident to arrest or as an inventory search. See *Colorado v. Bertine*, 479 U.S. 367 (1987); *New York v. Belton*, 453 U.S. 454 (1981); *South Dakota v. Opperman*, 428 U.S. 364 (1976). Moreover, consent could be easily "encouraged" by providing an explanation of these search possibilities to the person stopped,[15] whom police need not (and thus assuredly will

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[13]These decisions abrogated earlier guidance that, under *Terry*, persons subjected to involuntary traffic stops were "not obliged to respond" to police questioning. *Berkemer*, 468 U.S. at 439.

[14]Indeed, *Atwater* indicates a lack of concern with such arbitrary power. See *Atwater*, 532 U.S. at 347 ("a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review"); *id.* at 353 n.25 (discounting dissent's concern that holding will allow arbitrary police conduct).

[15]No apparent legal recourse exists for a person whose car is searched under these various scenarios. The person might seek to claim that the moving violation was merely a pretext for the true desire to search the vehicle. But this Court has foreclosed the opportunity of those subjected to traffic stops to argue that the stop was pretextual or that an improper subjective motivating

(continued...)

not) inform in advance that they are "free to go," *Ohio v. Robinette*, 519 U.S. 33, 35 (1996), or have a right to refuse, *Schneckloth v. Bustamonte*, 412 U.S. 218, 231-34 (1973).

This review of the Court's precedents shows why the *Terry* limits properly provide crucial Fourth Amendment protections to persons subjected to involuntary traffic stops. If police are allowed to seek consent to search during such stops independent of *Terry*'s scope and duration limits, everyone who wishes to avoid an arrest for a minor traffic violation will be placed in the untenable position of trying to divine whether a refusal would trigger a discretionary arrest while consent would not. Nothing in the Fourth Amendment or its jurisprudence warrants such a result.

This discussion also shows why one purported "anomaly" to which petitioner points is illusory. According to petitioner, if *Bostick* is not controlling here then officers will be constrained in the questions they can ask during an involuntarily traffic stop, though they could ask any questions of persons not in custody. Pet. 9. There is no anomaly because the situations are constitutionally distinguishable. Consent in a *Bostick* context is obtained from a fully voluntary contact between the government and an individual. By contrast, the consent here was obtained through involuntary contact between the government and Respondent, in an inherently dangerous context for both Officer Opelt and Respondent, and where the full power of governmental authority operated to pressure Respondent's consent. There is nothing constitutionally suspect in treating the two situations differently for Fourth Amendment purposes.

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[15](...continued)
factor prompted it, so long as police can point to any traffic violation, see *Whren*, 517 U.S. 806, or reasonable suspicion that a traffic violation had occurred (such as suspicion that the driver's ability to operate the vehicle was impaired).

Indeed, this Court has recognized how important continued application of the *Terry* limits are to properly constraining police during involuntary stops. In *Hiibel*, which upheld the constitutionality of a state statute that authorized arrest for failure to identify oneself to police, the challenger objected that the statute allowed "arbitrary police conduct." *Hiibel*, 542 U.S. at 188. The Court responded by relying upon the *Terry* limits: "Petitioner's concerns are met by the requirement that a *Terry* stop must be justified at its inception and 'reasonably related in scope to the circumstances which justified' the initial stop." *Ibid.* In endorsing the *Terry* limits, this Court was implicitly agreeing that they are necessary to protect against the possibility that police will "convert[] a routine traffic stop into a fishing expedition." *Hall*, 814 N.E.2d at 1016.

Petitioner's remaining arguments equally lack merit. Petitioner misconstrues *Caballes*, 543 U.S. 405, which held that dog sniffs do not constitute protected Fourth Amendment searches, in arguing that it supports petitioner's position here. First, and as explained above, petitioner ignores that Officer Opelt used consent to impermissibly prolong Respondent's traffic stop, which as *Brownlee* makes clear is unconstitutional.[16] Indeed, *Caballes* itself is consistent with this principle because this Court was careful to allow dog sniffs only during the initial detention period, while emphasizing that dog sniffs would not be allowed to prolong that period. *Caballes*, 543 U.S. at 407-08.

Second, petitioner's reliance upon *Caballes* is premised upon a fundamental misunderstanding of this Court's Fourth Amendment jurisprudence. Petitioner posits that, just as under *Caballes* a dog sniff is not a "search" for Fourth Amendment purposes, neither is a consent search during an involuntary traffic stop because it does "not infringe * * * constitutionally

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[16] See *supra* Part III.

protected privacy interests" so long as it does not result in an "incremental search or unduly prolong the seizure." Pet. 9-10.

This argument fails for a reason explained within *Caballes* itself. *Caballes* ruled that a dog sniff is not a "search" because it could uncover only something as to which no legitimate constitutional privacy interest exists—illegal drugs. *Caballes*, 543 U.S. at 409. This point was crucial to *Caballes* because it provided the only basis to distinguish *Kyllo v. United States*, 533 U.S. 27 (2001), which held unconstitutional police use of a thermal imaging device to detect marijuana cultivation in a private home. As *Caballes* explained, "[c]ritical to [*Kyllo*] was the fact that the device was capable of detecting lawful activity." *Caballes*, 543 U.S. at 409. Petitioner's analogy between this case and *Caballes* fails because a consent search during an involuntary traffic stop is constitutionally distinguishable from a dog sniff. Unlike a dog sniff—but like the invalidated *Kyllo* search—such consent searches will frequently, if not mostly, reveal lawful and innocuous behavior as to which persons enjoy a legitimate expectation of privacy.

Thus, the consent search at issue here was — as the court below properly held — constitutionally prohibited. Officer Opelt's request for consent to conduct a full-blown vehicle search during the involuntary traffic stop came at a point when neither probable cause nor reasonable suspicion existed any longer. The request thus sought to impermissibly prolong the stop, and also necessarily changed the nature of the stop in a constitutionally significant way because it invaded Fourth Amendment protected interests in keeping lawful conduct private.[17]

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[17] The drug paraphernalia found during Officer Opelt's impermissible search of respondent's car is immaterial to this point because Fourth Amendment standards are constructed to apply to the innocent as well as the guilty. See *Almeida-Sanchez v. United States*,

(continued...)

Equally unavailing is petitioner's assertion that the decision below creates an "anomaly" with *Texas v. Cobb*, 532 U.S. 162 (2001), a case that deals with persons in formal custody. Pet. 9. First, the Fourth Amendment was never even considered in *Cobb*, which instead was a Sixth Amendment right to counsel case. Second, persons subject to involuntary traffic stops are not, without more, in formal custody, a distinction that makes an undeniable constitutional difference both in this context and others. Cf. *Berkemer*, 468 U.S. at 440 (persons subject to traffic stop not in custody and thus not entitled to *Miranda* warnings). Moreover, there is nothing anomalous about granting those suspected of minor traffic offenses a greater scope of Fourth Amendment constitutional protections than are extended to those actually under arrest for more serious offenses. Thus, petitioner's attempt to equate the Fourth Amendment implications of a consent search during a non-custodial involuntary traffic stop with questioning once a suspect has been formally arrested, such as in *Cobb*, evinces a misunderstanding of basic constitutional doctrine.

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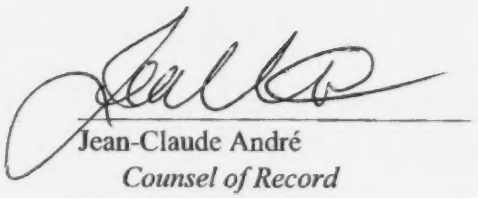
[17](...continued)
413 U.S. 266, 283-84 (1973) (Powell, J., concurring) (emphasizing that relevant factor in developing Fourth Amendment standards is "the probable degree of interference with the rights of innocent persons"); *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) ("[A] search against Brinegar's car must be regarded as a search of the car of Everyman").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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